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JUN 14 1982
ALEXANDER L. STEVAS,
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No. 81-2120

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DURHAM INDUSTRIES, INC.,

Petitioner,

—against—

THE NORTH RIVER INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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THE QUESTIONS PRESENTED

1. Is there a sufficient predicate for the grant of a writ of certiorari in this diversity case?

2. Did the Court of Appeals properly determine and apply state law?

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THE NORTH RIVER INSURANCE COMPANY,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

JURISDICTION

The Judgment of the Court of Appeals was entered on February 25, 1982, and the Petition for a Writ of Certiorari was filed within 90 days of that date. Petitioner apparently invokes the jurisdiction of this Court to review the decision of the Court of Appeals by Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

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* A list of the parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of The North River Insurance Company is set forth in Appendix "A" hereto.

STATEMENT OF THE CASE

Petitioner, DURHAM INDUSTRIES, INC., presents this case as one involving claims for fraud, perjury, and "misuse" of process. In actuality, the complaint in this diversity action set forth two counts: one for abuse of process, and the second for prima facie tort. The complaint also included a claim for punitive damages.

The action arose from the interposition of an affirmative defense by the respondent, THE NORTH RIVER INSURANCE COMPANY, in a prior action between these same two parties in the United States District Court for the Southern District of New York. The petitioner alleges that there was no basis for the affirmative defense and that it was interposed for purposes of delaying payment to petitioner until respondent had recouped certain collateral. Jurisdiction in both the prior action and in the case at bar was predicated upon diversity of citizenship, and the Courts properly applied the law of the State of New York.

The claim for abuse of process was dismissed as a result of certain pre-trial motions. At trial, DURHAM's motion to amend its complaint so as to allege a breach of contract was granted, but this count was dismissed at the close of DURHAM's case as was the claim for punitive damages. The issue of prima facie tort was submitted to the jury which returned a verdict in favor of the plaintiff for the full amount of compensatory damages claimed.

Respondent, THE NORTH RIVER INSURANCE COMPANY, appealed from the judgment entered upon the jury verdict finding it liable for prima facie tort. Petitioner DURHAM INDUSTRIES, INC. cross-appealed from the orders of the Court dismissing the claim for breach of contract and the claim for punitive damages.

The Court of Appeals for the Second Circuit reversed the judgment in favor of DURHAM, and remanded the action to

the District Court with instructions to dismiss the complaint. In doing so, the Court of Appeals reviewed the development of the doctrine of prima facie tort in New York, and concluded that the evidence adduced, viewed in the light most favorable to the plaintiff, DURHAM, was insufficient to support a finding of liability on a theory of prima facie tort. The Court of Appeals also found no merit under New York law in DURHAM's contention that its claim for punitive damages should have been submitted to the jury.

ARGUMENT

I.

The Petition lacks a basis for the grant of a Writ of Certiorari

Rule 17 of the Supreme Court Rules sets forth the character of reasons that will be considered by this Court in the exercise of its discretion to grant review on certiorari. Conspicuous by its absence is the reason presented by this petition, to wit, a purported conflict between a decision of the court of appeals and applicable state law.

Where an issue involves the determination and application of local law, normally the federal appellate courts are the final arbiters of state law for the federal courts within their circuit, and the Supreme Court will not review the considered determination of questions of state law by the federal courts of appeals, other than in exceptional circumstances. *Huddleston v. Dwyer,* 322 U.S. 232 (1944). Nor should the Supreme Court overturn a decision of the court of appeals unless the appellate court's determination of an important local law is clearly incorrect. Frankfurter and Hart, *The Business of the Supreme Court at October Term, 1933,* 48 Harvard Law Review 238, 269-270 (1934). The conflict between the decision of the court of appeals and applicable state law should be clear, not merely hypothetical or conjectural. 13 Moore's Federal Practice, ¶ 817.25-1[3].

Great weight should be accorded to the determination of local law made by the court of appeals, and a conflict between a decision of the court of appeals and applicable state law should not motivate the grant of certiorari unless the circumstances of the case are peculiar or the conflict particularly egregious. 13 Moore's Federal Practice ¶ 817.25-1[3]. Such is not the fact in the case at bar.

II.

The Court of Appeals properly applied well established principles of New York law in ruling that there was insufficient evidence of prima facie tort and no actionable claim for punitive damages.

Petitioner persists in asserting that the law of the State of New York is other than as stated by the United States Court of Appeals for the Second Circuit. However, petitioner fails to offer any authority to demonstrate that the Court of Appeals misapplied or wrongly interpreted the law of New York governing prima facie tort and punitive damages.

The law of New York is clear: malice, unmixed with any other motive, is an essential element of prima facie tort. *Beardsley v. Kilmer,* 236 N.Y. 80 (1923). It requires the infliction of intentional harm resulting in damage. *ATI, Inc. v. Ruder & Finn, Inc.,* 42 N.Y.2d 454 (1977); *Smith v. Fidelity Mutual Life Insurance, Co.,* 444 F. Supp. 594 (S.D.N.Y., 1978). The intention to harm, as distinguished from the intention merely to commit the act, must be present, must motivate the action and cause the injury to the plaintiff. *Ruza v. Ruza,* 286 App. Div. 767 (1955).

It is well-settled in New York that a claim of prima facie tort does not lie where the defendant's action has any motive other than a desire to injure the plaintiff. *RKO-Stanley Warner Theatres, Inc. v. Century Circuit, Inc.,* 37 A.D.2d 828 (1971); *Squire Records, Inc. v. Vanguard Recording Society, Inc.,* 25 A.D.2d 190 (1966); *Benton v. Kennedy-Van Saun Mfg. & Eng.*

Corp., 2 A.D.2d 27 (1956). The specific intent must be to do harm to the plaintiff, and that must also be the exclusive motive. *Korry v. International Telephone and Telegraph Corp.*, 444 F. Supp. 193 (S.D.N.Y. 1978). If a defendant acts from mixed motives, one of which is the furtherance of his own business interests, that is not enough. *Squire Records, Inc. v. Vanguard Recording Society, Inc., supra; Glenn v. Advertising Publications, Inc.*, 251 F. Supp. 889 (S.D.N.Y., 1966).

The Court of Appeals correctly applied the law of New York to the facts of this case. The Court of Appeals found that the evidence, viewed in the light most favorable to the plaintiff, may support a finding that THE NORTH RIVER INSURANCE COMPANY asserted the affirmative defense in order to postpone payment on its bond. However, such evidence established beyond doubt that THE NORTH RIVER INSURANCE COMPANY acted soley to advance its own business interests by seeking to mitigate or avoid a business loss. Indeed, petitioner's own pleadings and contentions support this finding inasmuch as petitioner has consistently avowed that respondent, THE NORTH RIVER INSURANCE COMPANY, asserted the affirmative defense in order to delay payment until such time as it recouped its collateral. Clearly, by petitioner's own averments, respondent sought to further its own interest, not to do harm to petitioner. The Court of Appeals correctly concluded that NORTH RIVER acted purely out of self-interest to mitigate or avoid a business loss. Under the law of New York, such a finding precludes liability on a theory of prima facie tort.

Petitioner's claim for punitive damages in this diversity case is also governed by the law of the State of New York. *Givens v. W.T. Grant Co.*, 457 F.2d 612 (2d Cir.), vacated on other grounds, 409 U.S. 56, modified 472 F.2d 1039 (2d Cir., 1972). The Court of Appeals correctly applied the well-settled law of New York that punitive damages are not recoverable for a mere breach of contract, for in such case, only a private wrong, not a public right is involved. *Sanfilippo v. Metropolitan Life Insurance Co.*, 74 A.D.2d 600 (1980). In such a case, the plaintiff must demonstrate, in support of its claim for punitive

damages, that defendant as an insurer had engaged in fraudulent, criminal or dishonest acts or practices affecting the general public and not merely in an isolated transaction incident to an otherwise legitimate business, or that in its dealings with the general public, defendant had engaged in a fraudulent scheme evincing such a high degree of moral turpitude and such wanton dishonesty as to imply a criminal indifference to civil obligations. *Hubbell v. Trans World Life Insurance Co.*, 70 A.D.2d 949 (1979), affirmed 50 N.Y.2d 899 (1980); *Thaler v. North River Insurance Co.*, 63 A.D.2d 921 (1978); *John C. Supermarket, Inc. v. New York Property Insurance Underwriting Association*, 60 A.D.2d 807 (1978). No such showing was made upon the trial of this action.

Furthermore, it is clear that under the law of New York a claim for punitive damages cannot stand alone but must be predicated upon some underlying cause of action. *M.S.R. Associates. Ltd. v. Consolidated Mutual Insurance Co.*, 58 A.D.2d 858 (1977). It is equally clear that New York does not allow punitive damages for prima facie tort. *Brandt v. Winchell*, 3 N.Y.2d 628 (1958); *Sheppard v. Coopers' Inc.*, 13 Misc. 2d 862, aff'd. 3 A.D.2d 909 (1957); *Winderbaum v. Winderbaum*, 39 Misc.2d 478 (1963). Under the law of New York, only actual damages may be recovered for prima facie tort. *Bohm v. Holzberg*, 47 A.D.2d 764 (1975); *Walsh Brothers, Inc. v. Jacob Ruppert*, 7 A.D.2d 896 (1959). Thus, it is clear that both the Court of Appeals and the trial court correctly determined and applied the law of New York to the issue of punitive damages, and properly dismissed petitioner's claim.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

List of parent companies, subsidiaries
(except wholly owned subsidiaries) and
affiliates of THE NORTH RIVER INSURANCE COMPANY

Parent:

Crum & Foster Corporation

Subsidiary:

Constitution Reinsurance Corporation

Affiliates:

International Insurance Company
United States Fire Insurance Company
C & F Credit Corporation
C & F Credit Corp. of California
Crum & Foster Insurance Company (Bermuda)
Ltd. (formerly St. John's Insurance Co., Ltd.)
Crum & Foster Managers (Bermuda) Ltd.
J.H. Blades & Co., (International) Ltd.
Blades, Driver & Co. Ltd.
Westchester Fire Insurance Company
Industrial Indemnity Company
International Surplus Lines Insurance Company
Crum & Foster Managers Corporation
Richard Whiley, Inc.
Industrial Underwriters Insurance Company
Industrial Insurance Company
Industrial Insurance Company of Hawaii, Ltd.
Industrial Indemnity Company of Alaska
Industrial Indemnity Company of the Northwest
Industrial Indemnity Life Insurance Company
California Insurance Company
Constitution Reassurance S.A.
London Agency, Inc.
Floyd West & Company

L.W. Biegler Inc.
L.W. Biegler Inc. (N.J.)
L.W. Biegler Inc. (N.Y.)
Crum & Foster of Canada Ltd.
Herald Insurance Company
Industrial Underwriters, Inc.
Industrial Indemnity Insurance Services
255 California Corporation
Multicomp Employees Association, Inc.
Duncan Services, Inc.
One Stop Insurance Shop, Inc.
Aviation Office of America, Inc.
Aviation Reinsurance Management Incorporated
Aviation Reinsurance Management (London) Limited
Premium Budget Corporation
International Aviation Underwriters, Inc.
American Eagle Insurance Company
American Meridian Insurance Company Limited
Aviation Adjustment Bureau, Inc. (formerly AOA, Inc.)
J.H. Blades & Co., Inc.
J.H. Blades, Inc.
Blades & Co. Services (La.), Inc.
J.H. Blades of Louisiana, Inc.
Blades & Associates Ltd.
J.H. Blades & Co. (Pte.) Ltd.
Fairfax Underwriters Services, Inc.